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Moody's *Governments & Municipals, 1958*, p. 1656 7

Natural Resources, from *The Challenge to America: Its Economic and Social Aspects*, a Special Studies Report of the Rockefeller Bros. Fund, 1958, printed in pertinent part at 105 Cong. Rec. 1049 ..... 25, 26

U.S. Department of Commerce, Business Services Bulletin No. 136, *Water Use in the United States, 1900–1975*, table 1 26

U.S. Geological Survey, *Water Requirements of the Pulp and Paper Industry*, Washington, D.C., 1957, p. iii 26

Wage and Hour Interpretative Bulletin No. 5, Dec. 2, 1938, revised Nov. 1939 12

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. —

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

H. B. ZACHRY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on January 5, 1959.

OPINIONS BELOW

The memorandum decision of the District Court on the petition for preliminary injunction (R. 78–84) is not reported. The memorandum opinion of the District Court upon final disposition of the case (R. 131–142) is reported unofficially at 13 W.H. Cases 881. The opinion of the Court of Appeals (App., *infra*, pp. 31–40) is reported at 262 F. 2d 546.

JURISDICTION

The judgment of the Court of Appeals was entered January 5, 1959 (App., *infra*, pp. 40–41). By order of

Mr. Justice Black, dated March 26, 1959, the time for filing a petition for a writ of certiorari was extended to June 1, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Respondent is a large construction contractor engaged primarily in the construction of industrial projects, including highways, railroads, airfield facilities, power lines, dams and water facilities. The employees involved here have been engaged in the construction of a six million dollar dam and reservoir (the physical construction part of a 15½ million dollar project), designed to inundate, replace and expand the existing dam and water facilities serving the industrialized city of Corpus Christi, Texas, and vicinity, in order to furnish "a much needed and more abundant source of water supply" to insure ability to meet present and increasing requirements. Between 40 and 50 percent of the total water furnished by the City has been to industrial users. A substantial proportion of the water furnished and to be furnished by the City is to interstate instrumentalities such as railroads, truck transportation companies and the airport, and to producers of goods for interstate commerce (which include "practically all of the major industries" in the City and vicinity).

The primary question presented is:

1. Whether respondent's employees engaged in the construction of this project were engaged "in the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

If the trial court was correct in ruling that this construction project was within the Act's coverage, another question presented is:

2. Whether an injunction restricted to this single project (construction of which was virtually completed by the time judgment was entered) is an adequate exercise of the judicial authority provided by Section 17 of the Act to restrain future violations, where the employer has violated the Act on other projects in the past and has not made, or agreed to make, restitution of substantial underpayments due employees for past violations.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U.S.C. 201, *et seq.*), are as follows:

> SEC. 3 As used in this Act—
>
> * * * * *
>
> (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.
>
> * * * * *
>
> SEC. 7. (a) Except as otherwise provided in this section, no employer shall employ any of

his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

SEC. 17. The district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands shall have jurisdiction, for cause shown, to restrain violations of section 15: *Provided,* That no court shall have jurisdiction, in any action brought by the [Secretary of Labor] to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

STATEMENT

1. The Secretary of Labor brought this action pursuant to Section 17 of the Fair Labor Standards Act to enjoin respondent from violating the overtime requirements of the Act. Respondent is a large construction company, incorporated in Delaware with its principal office in San Antonio, Texas (R. 6, 22), engaged primarily in the construction of industrial projects such as highways, railroads, power lines, dams, and water facilities (App., *infra,* p. 31). In the three years before trial, it had completed a total of 185 projects valued at over $77,000,000, most of which projects

were concededly of an interstate character subject to the Fair Labor Standards Act (R. 140–141).

The project here in issue was a $6,170,378 contract (Plf. Exh. 7) for the construction of a dam and impounding facilities—the physical construction part of a project costing a total of 15½ million dollars (R. 41)—on the Lower Nueces River near Mathis, Texas, referred to in these proceedings as the Mathis Dam. Construction of the project continued over a period of approximately two years,[1] during which time a large number of construction workers, ranging from 85 to 400, were employed by respondent on the project (R. 22). Non-compliance with the overtime requirements of the Act with respect to these construction workers is undisputed, respondent contending that they were not covered by the Act (R. 79–80). The difference between the amounts paid to these employees and the amounts that would be due under the Act was estimated by the Government investigator to be in excess of $70,000 (R. 31), and conceded by respondent to be in the neighborhood of $50,000 (R. 123).

The trial court in its preliminary opinion (after a hearing on the Secretary's motion for a preliminary injunction) (R. 82–83) and again in its final opinion (R. 139) held that the Act was applicable. It declined, however, to enjoin the defendant with respect to future similar projects, limiting its injunction to the Mathis Dam project (R. 142, 143–144), which by the time of final judgment was virtually completed (R. 95).

[1] The contract for construction was dated October 1955 (Plf. Exh. 7) and work was scheduled to be completed by the end of 1957 (R. 37). It was more than 99 percent completed at the time of the trial on February 21, 1958 (R. 85, 95).

The Court of Appeals reversed the coverage ruling and held that the construction employees at the dam were not covered by the Act (262 F. 2d at 552; App., *infra*, pp. 31–40). Accordingly, it did not reach the issue, presented by the Secretary's cross appeal (R. 153), whether the trial court in limiting its injunction to the single (substantially completed) project, had exceeded the bounds of sound judicial discretion.

2. The facts pertinent to the question of coverage are not in dispute.

Respondent was under contract with the Lower Nueces River Water Supply District to build a dam some 1,400 feet downstream from the existing dam (R. 46), which would be submerged upon completion of the new dam, but protected and "maintained intact" until such completion so that the water supply from the existing dam and reservoir would not be interrupted (Plf. Exh. 7)—"to the end that the City [Corpus Christi, Texas] shall continue to have a supply of water uninterfered with by and during construction operations" (Plf. Exh. 1, p. 4). The project was designed "to furnish the City with a direly needed additional water supply to insure it the ability to meet its present requirements and for its future growth and development," by taking advantage of the City's right to impound more waters of the Nueces River, which could "not be realized by the present impounding facilities." The new dam would create a reservoir "of much greater capacity, offering to the City a much needed and more abundant source of water supply than that afforded by the present facilities" (*id.* p. 2).

According to the trial court's uncontested findings, "the purpose of the new dam was to provide a tremendously enlarged reservoir, which will inundate the existing dam and reservoir and furnish an adequate water supply for the city" (R. 81). It was, the court found, "the most practicable means of enlarging the existing water reservoir so as to enable the city to secure a much needed and more abundant source of water supply" (R. 83).

The city water system serves a district with a population of approximately 200,000, including the industrialized city of Corpus Christi, with a population of approximately 165,000 (R. 51). Among the industries served by, and dependent upon, the city water system are railroads, truck transportation companies, the airport and other instrumentalities of interstate commerce (R. 56–57), and various producers of goods for commerce (R. 61–65). It is conceded that "practically all the major industries in this area" sell their products in interstate commerce (R. 62) and there "is no dispute that these industries use a large quantity of water" (R. 63). Corpus Christi is "an important oil refining and shipping center on the Gulf Coast [whose] industries include cotton compressing, textile manufacturing, canning, production of sheet metals and chemicals,"[2] carbon-black manufacturing, zinc refining, foundries, alkali-chemicals and cement plants, cotton ginning, cottonseed oil mills, and the manufacture of oil-field supplies and paint.[3]

[2] See Moody's *Governments & Municipals, 1958*, p. 1656.

[3] See The Columbia Lippincott Gazetteer of the World (Columbia Univ. Press, 1952); p. 452.

The trial court found that "A substantial amount of water furnished and to be furnished by the city is to industries producing goods which move in interstate commerce" and "largely is used in the productive process but, in some instances, it becomes an ingredient of the goods produced and subsequently moving in commerce" (R. 81). More particularly, the City's water consumption records show that from 40 to 50% of the total volume of water furnished by the City's existing system during the two years preceding the trial of this case was to industrial users (as distinguished from residential, commercial, hospital, municipal, and other users), and that the amount furnished industrial users averaged more than half a billion gallons a month (Plf. Exh. 6).

On the basis of these facts, the District Court concluded that the construction project, "while providing a new and larger dam and reservoir, actually supersedes, incorporates and makes use of the existing dam and reservoir so that by all practical considerations, as distinguished by technical conceptions, it is at once an improvement, a rebuilding and a new construction" (R. 83). Accordingly, it held the work on the dam was "so directly and vitally related to furnishing water which the city in turn will furnish to water users producing goods in commerce as to be in practical effect an unbroken chain in, and part of, such commerce rather than an isolated, local activity" (*ibid.*).

3. The Court of Appeals, although recognizing that "[i]ndustries in and around Corpus Christi used large quantities of water from the present water system and

reservoir and will continue to do so as a necessary part of their activities in producing goods for commerce" (App., *infra*, p. 32), reversed the District Court and ruled that the construction work was not covered by the Act because not "closely related" and "directly essential" to the production of goods for commerce within the meaning of Section 3(j), as amended in 1949 (*supra.* p. 3).

The reasoning of the Court of Appeals was that, prior to the 1949 Amendments, it had been "consistently held" that employees engaged in the "original construction" of buildings or facilities were not within the coverage of the Act even if the building or facility when completed would be used in the production of goods for interstate commerce, that "[c]ertainly no broader coverage has been intended by the amendment of 1949," and that "[r]eference need not be made to Committee reports or other aids by way of legislative history for the court to draw the conclusion that the intent of Congress in the enactment of such amendments was to add rather than detract from the class of employees to be considered as engaged in local enterprises" within the rationale of the *Callus* decision (*10 E. 40th St. Bldg., Inc.*, v. *Callus*, 325 U.S. 578). (App., *infra*, pp. 36–39.)

REASONS FOR GRANTING THE WRIT

I

The decision below, both in its result and in its reasoning, conflicts directly with the ruling of the Eighth Circuit in *Chambers Construction Co.* v. *Mitchell*, 233 F. 2d 717, as well as with the considered view expressed by the Tenth Circuit in *Mitchell* v. *Cham-*

bers Construction Co., 214 F. 2d 515. The reasoning below—particularly in its application of the technical "new construction" doctrine to the "production of goods for commerce" aspect of the coverage of the Fair Labor Standards Act, and in its assumption that the 1949 amendment to Section 3(j) was designed to exclude all such construction from the Act's coverage as "local" enterprise—is also inconsistent with opinions of this Court, subsequent as well as prior to the 1949 Amendments, as well as contrary to the 1949 legislative history specifically approving prior pertinent judicial decisions.

The issue presented is of substantial importance, not only because of the large and growing number of similar water construction projects throughout the country, but also because of the far-reaching implications of the rationale of the decision which if unreviewed will tend to confuse and unsettle other long-standing interpretations of the Act's "production" coverage.

1. As the court below explicitly recognizes (App., *infra*, pp. 39–40), its decision is in direct conflict with the Eighth Circuit's decision in *Chambers Construction Co.* v. *Mitchell*, 233 F. 2d 717, and with the "expressed * * * view" of the Tenth Circuit in *Mitchell* v. *Chambers Construction Co.*, 214 F. 2d 515.

(*a*) The Eighth Circuit decision (decided June 5, 1956) upheld coverage of employees engaged in the construction of a new water main to replace and expand part of the existing municipal water system of the city of Beatrice, Nebraska, whose customers, as here, included railroads, and industrial firms using the water in various ways to manufacture

products sold in interstate commerce. The decision rested on the ground that employees engaged in "replacement improvement" of such a facility, which regularly and substantially serves the needs of interstate instrumentalities and interstate producers, are engaged in a "closely related process or occupation directly essential to the production [of goods for commerce]" within the meaning of Section 3(j) of the Act as amended in 1949 (233 F. 2d at 722).

The court below rejected the Eighth Circuit's views in the *Chambers* case. Noting the Eighth Circuit's discussion of *Mitchell* v. *Vollmer & Co.*, 349 U.S. 427, in which the Act was held to cover "new construction" of an alternative link in an existing waterway system, the Fifth Circuit rested its disagreement on the ground that the Eighth Circuit had "equated the new construction concept as to instrumentalities of commerce, *Vollmer* v. *Mitchell, supra;* with construction of facilities to be used for production of goods," and that it had failed to recognize "the distinction between these two bases of coverage" (App., *infra,* pp. 39–40). This Court's rejection of the "new construction" doctrine in *Vollmer,* the Fifth Circuit reasoned, was limited to the "in commerce" aspect of coverage, and therefore afforded "little guidance in construing the definition section relating to production of goods for commerce" (App., *infra,* p. 39).

In contrast, the Eighth Circuit, "[w]hile conceding the distinction" between "improvements to interstate instrumentalities" (with which *Vollmer* dealt) and "facilities * * * used to produce goods for interstate

commerce" (with which *Chambers* was concerned), expressly held that the difference was not significant so far as the application of the "new construction" doctrine is concerned (233 F. 2d at 722). It noted the breadth of the statutory language in Section 3(j) defining the scope of the Act's "production" coverage (*supra*, p. 3), and pointed out that, even prior to *Vollmer's* rejection of the "new construction" doctrine as applied to "in commerce" coverage, the broader scope of "production" coverage had been recognized to encompass "replacement-improvement" construction (*ibid.*). It held that *Vollmer* only confirmed for the "in commerce" field the principle theretofore established "that the 'new construction rule' is not applicable to the *repair or replacement of existing facilities*" (*id.* at 721–722; emphasis the court's).[4]

(*b*) The Tenth Circuit's earlier *Chambers* case, which was decided prior to this Court's *Vollmer* deci-

[4] The Fifth Circuit's assumption that "replacement-improvement" projects were recognized as noncovered "original construction" by the pre-1949 administrative Interpretative Bulletin (Wage and Hour Interpretative Bulletin No. 5, Dec. 2, 1938, revised Nov. 1939), and by the pre-1949 "original construction" court decisions (App., *infra*, p. 38) is squarely opposed to the Eighth Circuit's explicit ruling that "the words 'original construction' in the interpretative bulletin contemplated a different situation than replacement or repairs * * * thus making reliance on that bulletin in this instance ill-advised" (233 F. 2d at 722), and that, insofar as "the *Vollmer* decision infers that the 'new construction rule' is not applicable to the *repair or replacement of existing facilities*" (emphasis the court's), it was "not a change in the law" but "has been true ever since the F.L.S.A. was passed in 1938" (*id.* at 721). See also, *infra*, p. 18, fn. 10.

sion, involved employees engaged in the construction of a new reservoir and chlorinator house designed to connect with and substantially augment the water system of the city of Cheyenne, Wyoming, which, like the Corpus Christi system, furnished large quantities of water both to interstate instrumentalities and to industries engaged in the production of goods for commerce. The primary issue on appeal was coverage, and the Court of Appeals, after fully discussing the facts and the authorities on this issue, expressed agreement with the Labor Department's view that the employees were engaged in constructing "an addition to or enlargement of an existing water system to meet its expanding needs", and that therefore the "original construction" concept was inapplicable. Although the court's actual decision rested on the ground that its position on coverage was "not decisive of the ultimate question whether the trial court abused its discretion in denying an injunction" (214 F. 2d at 517), its view on the coverage issue, after full and elaborate consideration, is entitled to more authoritative weight than mere dictum.[5] Cf. *Railroad Companies* v. *Schutte,* 103 U.S. 118, 143. Indeed, the Fifth Circuit itself, in a prior decision by a different panel, cited the Tenth Circuit's *Chambers* decision as authority for its ruling that a new building constructed as "an improvement of an existing facility—an operating radio station" is within the coverage of the Act "in any vintage," and that *Vollmer,* "decided sub-

[5] The Fifth Circuit summarily dismissed the Tenth Circuit's decision as one which "did not need to, and did not, decide the issue" (App., *infra*, p. 39).

sequent to the Trial Court's action, made it [coverage] doubly sure." *Mitchell* v. *Hodges*, 238 F. 2d 380, 384 (C.A. 5).

2. In rejecting the *Chambers* cases as wrongly decided, the decision below proceeds upon premises inconsistent with the correct principles for determining this Act's coverage.

(*a*) The view that *Vollmer's* rejection of the "new construction" concept relates only to the Act's "in commerce" coverage disregards the principle on which that holding rests. While *Vollmer* was concerned with a project involving the Act's "in commerce" coverage, reliance was placed on two "production" decisions (*Kirschbaum* and *Alstate*[8]) to support its specific ruling that the Act's coverage is not to be controlled by the "new construction" concept (derived from decisions under an Act "of another vintage") (349 U.S. at 429).[9] *Vollmer's* ruling that "in commerce" coverage is to be "determined by practical considerations, not by technical conceptions" is, in our view, contrary to the inference drawn by the court below that the "production" phase of the Act's coverage may be determined by such "technical conceptions."

In rejecting "technical conceptions," *Vollmer* was following this Court's prior rulings. *Kirschbaum*,

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[8] *Kirschbaum* v. *Walling*, 316 U.S. 517; *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13.

[9] It seems of some significance that the *Vollmer* opinion, throughout, invariably speaks in terms of "an instrumentality or *facility* of interstate commerce" (emphasis added), as does the more recent *Lublin* opinion, 358 U.S. 207.

one of the earliest decisions on coverage, had established that no "dependable touchstone" or "rigid formulas" or "general propositions" could be used to determine "whether employees are 'engaged in commerce *or in the production of goods for commerce*,'" but that "the larger considerations of national policy, legislative history, and administrative practicalities * * *" must govern the judicial construction of Section 3(j) (316 U.S. at 520, 523, 526, emphasis added). Other "production" decisions had emphasized the national social purposes of the Act and the broad statutory coverage definitions, which were plainly designed to achieve the "[b]readth of coverage * * * vital to its mission" and must be construed by "practical judgment" not by any "hard and fast rule" (*Powell* v. *United States Cartridge Co.*, 339 U.S. 497, 516; *Roland Electrical Co.* v. *Walling*, 326 U.S. 657, 665). *Kirschbaum's* covering of employees of an independent company furnishing building space and maintenance to interstate producers, and *Roland's* covering of employees of an independent enterprise engaged in repairing and reconstructing motors for use in the production of goods for commerce, rested on the ground that the work of the employees had a "close and immediate tie with the process of production for commerce" and was "an essential part of it" (316 U.S. at 525–526; 326 U.S. at 665; see also *Callus*, 325 U.S. at 584)—a test which is virtually identical to the "closely related * * * directly essential" language of the 1949 Amendments, *supra*, p. 3; *infra*, pp. 19–22. And, since *Vollmer*, the Court has reemphasized this

"practical test" for coverage. *Mitchell* v. *Lublin, McGaughy & Associates*, 358 U.S. 207, 212 (involving "in commerce" coverage).

The teaching of this line of decisions, we submit, is that in determining "production" coverage, no less than "in commerce" coverage, the "pertinent inquiry is *not* whether 'new construction' is interstate commerce under the test" of the earlier Federal Employers' Liability Act cases (see *Southern Pacific Co.* v. *Gileo*, 351 U.S. 493, 499; emphasis added), but, rather, whether the relationship of the work to the "end [interstate] product" (see *Lublin*, 358 U.S. at 212) is such as to bring it within the broad purposes, and the equally broad statutory coverage definitions, of this modern social legislation.[8]

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[8] The interpretative bulletin on coverage of the construction industry issued in July 1956 and currently in effect (29 C.F.R. Part 776, Subpart B), on the basis of the *Vollmer* and *Kirschbaum* decisions, states the administrative position to be that "Under either of the two prescribed areas of covered work, coverage cannot be determined by a rigid or technical formula" but that "both phases * * * must be given 'a liberal construction' determined 'by practical considerations, not by technical conceptions'"; that the "new construction" concept would not serve as a reliable test for determining coverage; and that "[s]o far as construction work specifically is concerned, the courts have cast the relevant tests for determining the scope of 'in commerce' coverage in substantially similar language as they have used in construing the 'production' phase of coverage" (*id.*, Section 776.22). "Coverage of any construction work, whether new or repair work, depends upon how closely integrated it is with, and how essential it is to the functioning of, existing covered facilities. Neither the mere fact that the construction is 'new construction' nor the fact that it is physically separated from an existing covered plant, is determinative" (*id.*, Section 776.26).

(*b*) We do not believe that such a realistic and practical reading of the Act's "production" coverage is precluded by *Murphey* v. *Reed,* 335 U.S. 865. That short *per curiam* order (by a closely divided Court) gives no explicit indication of its grounds; it was issued before the question of the applicability of the "new construction" doctrine to this Act had been directly or adequately presented for judicial consideration; and the summary disposition of that employee's suit was in a context confused and overshadowed by an inadequate record and many other issues.* *Vollmer's* characterization of *Murphey* v. *Reed,* as involving "the building of a Navy base, not the improvement of a facility or an instrumentality of interstate commerce" (349 U.S. at 430, fn. 2), has left some area of doubt as to the application of the "new construction" doctrine, but, we submit, that doubt has been erroneously resolved in this case by the court below.

As applied to the present case, the Fifth Circuit's construction of *Murphey* v. *Reed* is inconsistent, at the least, with the recent *Lublin* ruling that "[w]hatever vitality the 'new construction' doctrine retains [after *Vollmer* and *Gileo, supra*], it is not applicable * * * [to] projects involv[ing] the repair, extension

* As the Fifth Circuit itself noted in its second decision in *Murphey*, after remand, "many complex important additional matters" were "not reached or passed on" by this Court's *per curiam* order (232 F. 2d 668, 671). Also, in its earlier opinion the Fifth Circuit had pointed out the inadequacy of the record, stating that the material facts had to be "dredged up from the record which [was] in many respects vague and uncertain," and plaintiffs had "wholly failed to discharge their burden of proving" the connection of their work with interstate commerce (168 F. 2d 257 at 259, 261).

or relocation of existing facilities" (358 U.S. at 213).[10] And as the Tenth Circuit said, in distinguishing construction of a multi-purpose dam and reservoir project from decisions like *Murphey* v. *Reed*: "* * * this is not new construction in the sense that a new building for the manufacture of goods for commerce is new construction. * * * It does not follow from the mere construction of such a building that it ever will have connection with commerce or be dedicated to the production of goods for commerce. It could, after its construction, be dedicated solely for intrastate commerce, if its owners deem such use advisable" (see *Tobin* v. *Pennington-Winter Construction Co.*, 198 F. 2d 334, 336, certiorari denied, 345 U.S. 915). As in *Pennington-Winter*, there is no question here that the dam and reservoir, by its mere construction, be-

[10] The "new construction" doctrine had been judicially held inapplicable, prior to the 1949 Amendments, to "new construction" of buildings, machinery and facilities designed to replace, improve or enlarge existing production facilities in *Walling* v. *McCrady Construction Co.*, 156 F. 2d 932 (C.A. 3), certiorari denied, 329 U.S. 785 (Nov. 25, 1946), approved by Congress, *infra*, pp. 20, 22.

All of the pre-1949 decisions relied upon by the Fifth Circuit below rested on the ground that solely "original construction," as distinguished from improvements, replacements and extensions of existing facilities, was involved (*e.g.*, *McDaniel* v. *Brown & Root*, 172 F. 2d 446, 471 (C.A. 10), on which the Fifth Circuit placed main reliance, specifically distinguished "work of repairing an existing building or facility or in constructing replacements of, or additions to, an existing building or facility;" similarly, *Kelly* v. *Ford, Bacon & Davis*, 162 F. 2d 555 (C.A. 3), specifically distinguished the type of "extension of current facilities" involved in the *McCrady* case; see also this Court's reference in *Vollmer* (349 U.S. at 430), distinguishing the construction work in *Murphey* v. *Reed*, 335 U.S. 865, from "work of improving existing facilities of interstate commerce").

comes unavoidably dedicated to the functioning of interstate instrumentalities and interstate production facilities, and is so designed, in size and location, that it is certain not to be "dedicated solely for intrastate commerce."[11]

(*c*) Moreover the Fifth Circuit's assumption that the "production" phase of coverage is to be more narrowly construed than the "in commerce" phase is clearly contrary to this Court's pre-1949 decisions expressly recognizing the *greater breadth* of "production" coverage. See *Armour & Co.* v. *Wantock,* 323 U.S. 126, 131; *McLeod* v. *Threlkeld,* 319 U.S. 491. See also *Tobin* v. *Girard Properties,* 206 F. 2d 524 (C.A. 5) (post-1949 case). And the basic premise of the decision below—that the 1949 amendment drastically narrowed the scope of "production" coverage—is contradicted by the legislative history of that amendment.

As stated by the chairman of the House Committee: "The amended section gives the courts a more specific guide as to the intention of Congress; it does not, however, radically revise the coverage of the act as it has been interpreted by the courts in the past" (95 Cong. Rec. 14942, October 18, 1949). Similarly, the Statement of the Majority of the Senate Conferees pointed out that the language was not intended to substantially change or limit the decisions construing the

[11] It seems quite likely that *Murphey* v. *Reed* was regarded as involving only the initial construction of buildings, barracks, mess halls, warehouses, recreation halls and similar installations appropriate for a temporary encampment, which might or might not be dedicated to interstate use, depending on the exigencies of war.

prior "necessary"-to-production language, but rather to "provide more certainty in this field," and specifically stated that the amended language "adopts the standard of closely related which the Supreme Court has supplied in most of its decisions interpreting coverage" (95 Cong. Rec. 14874). "This [amendatory] language," the Senate report continued, "is descriptive of activities which, although not an integral part of the productive operations, have a relationship to production which may reasonably be considered close as distinguished from remote and tenuous" and "contemplates activities which directly aid production in a practical sense by providing something essential to the carrying on in an effective, efficient, and satisfactory manner of operations which are part of an integrated effort for the production of goods" (*ibid.*).

Supplementing these general statements of legislative purpose, the Senate report lists, in detail, specific "typical" classes of employees and specific court decisions which would remain unchanged under the amended language. Among the decisions so listed were *Kirschbaum, Roland, Armour* v. *Wantock,* and *McCrady* (*supra,* pp. 15, 18, 19); as well as numerous other decisions of lower federal courts, including rulings upholding coverage of employees engaged in "[p]roducing and supplying fuel, power, *water,*[12] or

[12] Among the pertinent decisions explicitly approved in the legislative reports was *Reynolds* v. *Salt River Valley Water Users Ass'n,* 143 F. 2d 863 (C.A. 9), which upheld the coverage of employees of a water irrigation enterprise engaged in the maintenance of the facilities supplying water for irrigation to farmers who produced crops, some of which were destined for subsequent shipment in interstate commerce (95 Cong. Rec. 14875).

other goods for customers using such goods in the production of different goods for interstate commerce," and including "[e]mployees repairing, maintaining, *improving or enlarging* the buildings, equipment, or facilities of producers of goods * * * *whether they are employed by the producer of goods or by someone else who has undertaken the performance of particular tasks for the producer*" (95 Cong. Rec. 14874–75; emphasis added).[13]

The House Managers' Statement, while not so detailed regarding the extent to which prior judicial interpretation of "production" coverage would remain unchanged, also confirms the limited nature of the change, expressly stating that the amendatory

[13] The examples cited in the Senate report to illustrate the type of activities which would *not* be covered under the amendatory language also confirmed the limited effect intended by the amendment—*viz.* "the procurement of land for a new factory or the manufacture of brick for its buildings," or "employees of a local real estate firm renting apartments or dwelling houses to tenants, some of whom are employees of a factory producing goods for interstate commerce" (as distinguished from "employees engaged in operating or maintaining living facilities for employees of a producer of goods for interstate commerce, in situations where living facilities such as food and lodging are provided as a means of assuring continued and efficient production," which, it was expressly stated, would remain covered) (95 Cong. Rec. 14874). In contrast to the numerous court decisions specifically approved by the Majority Senate Report, not a single specific judicial decision or administrative interpretation on coverage was disapproved. It is evident that the amendatory language was viewed by the Majority Senate Conferees simply as a measure to counteract the fears or possibility that it "might be argued" that coverage extended to such "remote or tenuous situations," since "[t]he definition in the present act provides no clear cut-off preventing *extension* of the coverage of the Act" to such extremes (*ibid.*; emphasis added).

language would not affect the coverage of employees such as those involved in *Kirschbaum* or employees "who make, repair, or maintain machinery or tools and dies used in the production of goods for commerce" or "employees of public utilities, furnishing gas, electricity *or water* to firms within the State engaged in manufacturing, producing, or mining goods for commerce," all of whom "will remain subject to the act" as "doing work that is closely related and directly essential to the production of goods for commerce" (95 Cong. Rec. 14928–29).[14]

[14] The legislative history shows that the 1949 amendment was *not* intended to add to the class of non-covered "local enterprises" such enterprises as power and water utilities (see *supra*, pp. 20–21), or construction companies engaged in "improving or enlarging the buildings, equipment or facilities of producers of goods" (*Walling* v. *McCrady Construction Co.*, 156 F. 2d 932 (C.A. 3), discussed *supra*, p. 18), or companies engaged in the "[p]roduction of tools, dies, designs, patterns, machinery * * * or other equipment used by purchaser in producing goods for interstate commerce", or companies engaged in furnishing watchmen, or maintaining burglar alarm systems, or providing other protective services to producers of goods for commerce. See Statement of Senate Conferees, 95 Cong. Rec. 14874–14875; Statement of House Managers, 95 Cong. Rec. 14929.

10 East 40th Street Building, Inc. v. *Callus*, 325 U.S. 578—on which the court below relies heavily—involved building maintenance employees of an independent enterprise engaged exclusively in "running an office building" rented to the general miscellany of tenants for offices, some of which "may, for the time being, be [the executive or sales] offices of manufacturing enterprises" engaged *elsewhere* in the physical production of goods for commerce (325 U.S. at 583–584). In marked contrast to the instant case, there was no evidence that the maintenance of the building had any direct or essential or regular relationship to the functioning of any specific interstate instrumentalities or interstate producers. Even on the "thin" evi-

(*d*) Finally, the court's statement that the employees here "obviously * * * are not actually, while building the dam, producing any goods for commerce" (App., *infra*, p. 33) ignores the practical engineering fact that the very construction of the dam project impounds or "produces" the water ("goods"), just as coal, natural gas and oil are captured or "produced" by digging or drilling.[13] Since admittedly the construction work was designed to supply water essential

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dence in *Callus*, the Court found the question of coverage to be a very close one.

Certainly, respondent Zachry's business as a whole, in contrast to the *Callus* enterprise, cannot qualify as a "local enterprise," by any stretch of the imagination, since the bulk of its work (over 96% during the past three years of a total of 178 jobs, and almost 85% of a total dollar volume of over $77 million) is concededly of an interstate character subject to the Fair Labor Standards Act, including highways, railroads and power lines, as well as water systems (R. 140–141; Gov't. Exh. I—Answer to Interrogatories VIII).

[13] See *Warren-Bradshaw Drilling Co.* v. *Hall*, 124 F. 2d 42, where the Fifth Circuit held that the operator of a rotary drilling rig and the members of his crew, who performed the preliminary drilling of holes short of oil producing sand, "if not engaged in mining for and the production of oil, within the meaning of the act, *as actually mining and producing the oil, and we think they were*, were certainly engaged in processes or occupations necessary to the production of oil" (at p. 44; emphasis added). This Court, in affirming (317 U.S. 88), ruled that "[w]hether or not respondents, in drilling to a specified depth short of oil, may be regarded as engaged in producing or mining—*and we certainly are not to be understood as intimating that they may not*—recognition of the obvious requires us to hold that, *at the very least*, they were engaged in a 'process or occupation necessary to the production' of oil," *since "those activities certainly bear as 'close and immediate tie' to production as did the services of the building maintenance workers held within the Act in Kirschbaum Co.* v. *Walling* * * *" (at p. 91; emphasis added).

to the functioning of interstate instrumentalities (as well as to producers of goods for interstate commerce), the construction workers were engaged in the production of goods "for commerce" in the same manner and degree as the workers preparing materials for use in the construction of interstate highway improvements in *Alstate Construction Co.* v. *Durkin,* 345 U.S. 13, or as the employees engaged in producing ice for refrigeration of railroad cars in the "ice company cases" (see the decisions cited with approval in *Alstate,* 345 U.S. at 16, fn. 4).[16]

3. The importance of the coverage question here presented extends far beyond employment on water-supply construction projects. The basic premises of the decision below—particularly its broad application of the "new construction" doctrine, and its misconcep-

[16] As noted above (*supra*, p. 8), the District Court found that water impounded by the dam would become an "ingredient" of goods moving in interstate commerce. This finding was apparently based upon judicial notice of the water content of products manufactured by various industries in Corpus Christi. Since the Government did not undertake to present evidence that the water became an ingredient of any products, this was not urged below as a ground for coverage, and the trial court's final opinion, at the close of the trial on the merits, made no reference to the "ingredient" point, resting its decision on the "closely related * * * directly essential" language of Section 3(j). The Court of Appeals, in reversing the District Court's holding of coverage, clearly gave no consideration at all to the "ingredient" point.

While this ground for coverage has not hitherto been pressed in this case, we believe that the evidence in this record, supplemented by facts of common knowledge or authoritative publications properly subject to judicial notice, would make reliance upon this ground of coverage appropriate; if certiorari is granted we shall develop the point.

tion of the effect of the 1949 amendment to Section 3(j) of the Act—not only affect construction workers on a wide variety of other projects for the expansion, improvement or replacement of industrial production facilities, but have far-reaching implications on the scope of "production" coverage generally. If left unreviewed, the decision will, we believe, confuse and unsettle many long-standing administrative interpretations which are predicated on a different conception of this Court's decisions and of the effect of the 1949 amendment, with consequent loss to numerous employees of the important remedy provided by Section 16(c) to recover wage claims.[17]

Even if the impact of the decision below were limited to employment in the enlargement of water-supply facilities, the coverage issue would be of substantial importance. There is a considerable and fast-growing demand throughout the country for additional supplies of water, a trend which is expected to require, by 1975, more than twice the amount of water now being used (*Natural Resources,* from "The Challenge to America: Its Economic and Social Aspects," a Special Studies Report of the Rockefeller Bros. Fund, 1958, printed in pertinent part at 105 Cong. Rec. 1049). This pressure for expansion of the nation's water-supply facilities reflects not only the growth of the population, but also the increase in the nation's industries and the additional demands of

[17] The Section 16(c) remedy, enacted by the 1949 Amendments, cannot be used "in any case involving an issue of law which has not been settled finally by the courts * * *."

newly developed industrial processes. American industry, according to the latest estimates of the United States Department of Commerce, used more than ten times as much water in 1955 as it did in 1900, and almost half as much again as it did in 1950, consuming in 1955 roughly 45% of the total water supply (Business Services Bulletin No. 136, "Water Use in the United States, 1900–1975," table 1). Its proportionate use of the water supply is also climbing. "Use of water by industries and utilities is the fastest-growing segment of [the Nation's] water consumption" (*America's Water Needs: Their Investment Significance,* Domenick & Domenick, N.Y., May 1957 pp. 4–5).[18]

[18] In absolute figures, the amounts of water consumed in industrial operations is enormous. Electric utilities alone consume 60 billion gallons daily in the steam generation of power, using 75 gallons for each 1,000 kilowatt hours; and a single large steel mill may alone consume 500 million gallons a day (*ibid.*). The manufacture of a ton of rayon requires 300,000 gallons of water, and the United States turns out 600,000 tons of rayon a year (*Natural Resources, supra*). As the production of kilowatt hours of power, and tons of steel and rayon and other water-consuming products increase, along the well-known current projections of established trends, these figures of water consumption will swell correspondingly. "The recent and current industrial expansion * * * has resulted in a tremendous increase in the total withdrawal of water * * *. This increase in industrial water requirement has strained the capacity of the developed water supplies in many areas * * *." U.S. Geological Survey, *Water Requirements of the Pulp and Paper Industry*, Washington, D.C., 1957, p. iii. The continuing extent of the strain is indicated by the estimate, noted above, that by 1975 "the increase in our population, coupled with the growth of industries which require large quantities of water, will more than double the current rate of water consumption" (*Natural Resources, supra*).

II

While the appellate court below did not reach the issue presented by the Secretary's cross-appeal to that court—*i.e.*, whether the trial court erred in limiting injunctive relief to the single construction project which led to the institution of this suit, rather than granting an injunction restraining future violations on similar projects—this question will necessarily arise if the decision below is reversed on the coverage question. This is, also, an issue of general importance in the enforcement of the Act, and particularly in the region within the jurisdiction of the Fifth Circuit where a large proportion of the violations occur and where resort to judicial enforcement is most frequently required.

Though we recognize that the grant or denial of injunctive relief is a matter within the sound discretion of the trial court, the standards which have been adopted by the Fifth Circuit as warranting denial of injunctive relief exceed, we believe, the bounds of legal discretion. In particular, the Fifth Circuit has announced that a Section 17 injunction imposes "substantial disadvantages" on the employer "without at the same time giving the enforcement agency any real substantial benefit", and that "right to challenge substantial questions of coverage ought to be freely open to good faith litigation by an employer unfettered, in that process, by the prospect of contempt proceedings" (*Mitchell* v. *Hodges*, 238 F. 2d 380, 383). See also *Mitchell* v. *Bland*, 241 F. 2d 808 (C.A. 5). This has resulted in a disregard of the public interest and of the co-ordinate duty which the statute imposes upon the

courts to aid in the enforcement of the national policy—imposing on the Government the burden and expense of repeated investigations of and litigation with the same employers.[19]

[19] Section 17, as amended in 1949, expressly deprived the courts of jurisdiction, in an original injunction action by the Secretary, to order payment of unpaid wages resulting from past violations (*supra*, p. 4). Because of this limitation, an injunction issued thereunder is a peculiarly mild remedy, ordering nothing more than *future* compliance with requirements imposed by the statute itself, without the ordinary equity remedy of restoration of unlawfully acquired gains. Unless and until an injunction is issued, an employer stands a good chance of retaining financial benefits resulting from noncompliance. As this Court noted in *Lublin:* "We fail to see what undue burden will be placed on respondent by the issuance of an injunction * * *" (358 U.S. at 214). The plain fact is that the injunction imposes no disadvantage on an employer with good faith intentions to comply in the future. It serves as little more than a warning order that the court will be in a position to order restoration of underpayments resulting from *future* violations, since the proviso in Section 17 prohibiting back pay orders does not affect "the court's jurisdiction or authority in contempt proceedings for enforcement of injunctions issued under Section 17 for violations occurring subsequent to the issuance of such injunctions" (95 Cong. Rec. 14879).

Thus, the issuance of the injunction does give a very "real substantial benefit" to the enforcement agency, whereas the supposed "burden" or "disadvantage" to the employer consists of subjecting him to the remedy of restitution of unlawfully acquired benefits that may result from repeated violations in the future. If such violations are unintentional, the employer is not subject to criminal or punitive contempt proceedings, and in civil contempt proceedings he is as free to litigate substantial questions of coverage as he would be in an original injunction action. So far as an injunction under this Act is concerned, living under the "pain of contempt citation", as a practical matter, implies no more (except in cases of willful or criminal violation) than that the restitution remedy will be available.

The problem is particularly acute in the construction industry where any particular project is virtually completed before a case can be investigated and litigated to final judgment. The instant case is an apt illustration of how enforcement of the Act can be frustrated, to the substantial advantage of the employer and corresponding disadvantage to employees and complying competitors and the public interest. The trial court (although convinced of the applicability of the Act) denied a preliminary injunction (R. 84), apparently on the ground that respondent Zachry "is a good, solvent company" (R. 31) "fully able to respond to any judgment" (R. 84). By the time of the trial court's final judgment, the project was virtually completed, and the accumulated wage deficiencies estimated by the Government investigator to be in excess of $70,000 (R. 31), and conceded by respondent to be about $50,000 (R. 123), remained unpaid. In these circumstances, the injunction issued by the trial court, limited to this single completed project, left respondent free to retain the accumulated underpayments and to acquire a similar financial advantage while contesting and litigating coverage of any similar future project.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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Department of Labor.

MAY 1959.

APPENDIX

In the United States Court of Appeals for the Fifth Circuit

No. 17311

H. B. ZACHRY COMPANY, APPELLANT-APPELLEE

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLEE-APPELLANT (AND REVERSE TITLE)

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

(January 5, 1959)

Before TUTTLE, JONES and WISDOM, Circuit Judges

TUTTLE, *Circuit Judge:* H. B. Zachry Company is a Texas corporation engaged in large construction projects. During its existence it has completed more than 1200 of a value of over $300,000,000. More than $78,000,000 worth of construction work was completed by this company during the three years preceding the trial. These projects include the building of highways, railroads, power lines, dams, and water systems. It was under contract with the Lower Nueces Water Supply District to build a dam for the purpose of providing a water reservoir approximately ten times the size of that previously existing. The District was under contract to furnish water exclusively for the City of Corpus Christi, Texas. The dam, known as

the Mathis Dam, is some 1500 feet downriver from an older dam which would be inundated upon the completion of the new construction.

Industries in and around Corpus Christi used large quantities of water from the present water system and reservoir and will continue to do so as a necessary part of their activities in producing goods for commerce.

Investigation by the Wage and Hour Division of the Department of Labor disclosed, without dispute, that certain construction employees of Zachry Company were not paid in accordance with the minimum wage requirements of the law—that is they were not paid time and a half for overtime beyond forty hours per week, unless the overtime hours occurred on days on which the employees worked more than eight hours, or unless they worked on Sunday. Following this investigation, the Secretary filed suit against Zachry seeking a temporary and permanent injunction against such alleged violation of the Wage and Hour law.

The trial court held a hearing on the motion for preliminary injunction, and although expressing the tentative view that the activities of the construction workers were covered by the Act, it declined to enter a temporary injunction pending a full development of the case on final trial. At the later trial the Court adhered to its view that the workers were covered by the Act, and granted an injunction as to the construction employees on the particular project only, stating when it did so that Zachry's president had estimated the project would be finished in thirty days. It elsewhere appeared in the record that the job was substantially completed.

Zachry Company appealed on the ground that the

construction workers on this project were not covered by the applicable section of the Wage and Hour Law.[1]

The Secretary of Labor filed a cross appeal contending that the trial court erred in not granting a general injunction against Zachry prohibiting violation of the terms of the Act as to all future activities of the company.

The Secretary concedes that the construction workers were not engaged "in commerce." If, therefore, his views are to prevail it must be on the basis of their being engaged "in the production of goods for commerce." Since obviously they are not actually, while building the dam, producing any goods for commerce, the Secretary's case must depend upon a construction of the definition section of the statute, 203(j), to the effect that the construction workers are employed "in [a] closely related process or occupation directly essential to the production" of goods.

Although this is a much litigated field, we find no decision of the Supreme Court, and only one Circuit

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[1] 29 U.S.C.A. 207(a) provides as follows:

"Except as otherwise provided in this section, no employer shall employ any of his employees who engaged in commerce, or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate of not less than one and one-half times the regular rate at which he is employed."

29 U.S.C.A. 203(j) reads:

"'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purpose of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State."

Court opinion in which this definition is sought to be applied to a state of facts closely similar to those here presented.[2] There are certain general pronouncements of the Supreme Court, however, which serve as guideposts to us in our attempt to apply this statute. The first of these is that this statute should be given a liberal construction, *Mitchell* v. *Vollmer,* 349 U.S. 427, 429. The second is that the scope of the Act is not co-extensive with the power of Congress over commerce. *Kirchbaum* v. *Walling,* 316 U.S. 517. As stated in *10 East 40th Street Building, Inc.* v. *Callus,* 325 U.S. 578, "in enacting this statute Congress did not see fit, as it did in other regulatory measures, e.g., the Interstate Commerce Act and the National Labor Relations Act, to exhaust its constitutional power over commerce." A further general principle is that which requires courts to undertake, if possible, to understand the purpose sought by Congress in adopting an amendment to a statute which has already been the subject of much judicial construction.

As to the first general principle above enunciated, we do not understand the Government to contend that the doctrine of liberal construction overrides the court's duty to construe the language of the statute as applied to a particular state of facts in the manner which the court concludes carries out the intent of Congress. We think that this Court has consistently followed the rule of liberal construction. Recent decisions of this Court, we think, evidence its purpose to apply the language of the statute liberally in areas of doubt. In discharging what the Supreme Court in *10 East*

[2] It is to be noted that this definition was changed by an amendment to the statute in 1949. Prior to that amendment the relevant part of the definition was that an employee should be deemed engaged in the production of goods if such employee was employed "in [a] process or occupation necessary to the production" of goods.

40th Street Building, Inc. v. *Callus, supra,* calls its "responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industry situations," this Court has held subject to the Act, because engaged in commerce, employees of a contractor engaged in building a new building for a radio broadcasting station, *Mitchell* v. *Hodges Contracting Co.,* 238 F. 2d 380, employees engaged in the construction of a field plant for production of materials essential to the construction of a causeway to become a link in an interstate highway system, *Archer* v. *Brown & Root, Inc.,* 241 F. 2d 663, and employees engaged in the construction of bulk jet fuel storage tanks and fueling systems at an airport for the United States Air Force, *Mitchell* v. *Empire Gas Engineering Co.,* 256 F. 2d 781, in which this Court stated "the Act is to be given a liberal construction. Whether an employee is engaged 'in commerce' within the meaning of the Act is determined by practical considerations, not by technical conceptions."

Regarding the second general principle, we think it plain both from the legislative history and the many court decisions emphasizing the fact, that not every activity that in any way affects commerce, and not every activity that in some way leads ultimately to the production of goods for commerce, is intended to be included within the terms of the statute. The law as it stood before the 1949 amendment was itself somewhat restricted, in that an employee, to come within the act, must be employed in a process *necessary* to the production of goods to have a covered status. As stated by the Supreme Court in 10 East 40th Street Building, Inc., *supra:*

> The series of cases in which we have had to decide when employees are engaged in an "occupation necessary to the production" of goods for commerce has settled at least some matters.

> Merely because an occupation involves a function not indispensable to the production of goods, in the sense that it can be done without, does not exclude it from the scope of the Fair Labor Standards Act. Conversely, merely because an occupation is indispensable, in the sense of being included in the long chain of causation which brings about so complicated a result as finished goods, does not bring it within the scope of the Fair Labor Standards Act. See *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564; *Walton* v. *Southern Package Corp.*, 320 U.S. 540; *Armour & Co.* v. *Wantock*, 323 U.S. 126; *Skidmore* v. *Swift & Co.*, 323 U.S. 134. In giving a fair application to § 3(j), courts must remember that the "necessary" in the phrase "necessary to the production" of goods for commerce "is colored by the context not only of the terms of this legislation but of its implications in the relation between state and national authority". *Kirschbaum Co.* v. *Walling, supra,* at 525. For as was pointed out in *Walling* v. *Jacksonville Paper Co., supra,* at 570, we cannot "be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states." We must be alert, therefore, not to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation.

In connection with this language it must be further recognized that the amendment of 1949 made even more restrictive the definition of production of goods for commerce by changing the word "necessary." to the term "directly essential," and by adding also the words "closely related" to modify the word "occupation." Reference need not be made to Committee reports or other aids by way of legislative history for the court to draw the conclusion that the intent of Congress in the enactment of such amendments was

to add to rather than detract from the class of employees to be considered engaged in local enterprises.

Obviously, an occupation might be necessary to the production of goods for commerce which is not closely related to production, and which even if closely related is not directly essential to production. Undoubtedly the employees who haul concrete to the dam site; those who clear the site; those who build the frames for the work and who actually pour the concrete or grade the earthen dam, are links in the "long chain of causation which brings about so complicated a result as finished goods."

The courts have consistently held, however, that those engaged in building a plant to be used for the manufacturing of goods do not even come within the more liberal requirement of the old statutory definition of "necessary to the production of goods." *McDaniel* v. *Brown & Root,* 10 Cir., 172 F. 2d 466. As noted in footnote 4, page 471, of the opinion in that case by the Court of Appeals for the Tenth Circuit:

> The view that employees engaged in the original construction of buildings or facilities are not within the coverage of the Fair Labor Standards Act, even if the building or facility, when completed, will be used to produce goods for commerce, is supported, we think, by the action of the Supreme Court in *Murphy* v. *M. T. Reed, et al.,* 335 U.S. 865, S. Ct. 105. In that case the Court of Appeals for the Fifth Circuit, 168 F. 2d 257, had held that employees of a contractor under a cost-plus-a-fixed-fee contract for the original construction of a Navy camp for training construction battalions (Sea Bees) and a Naval Advance Depot at Gulfport, Mississippi, were not within the coverage of the Fair Labor Standards Act of 1938, and that certain other employees, performing work under a cost-plus-a-fixed-fee contract for the maintenance and operation of such facilities,

were likewise not within the coverage of such Act, and reversed a decision of the District Court holding that both groups of employees were within the coverage of such Act. The Supreme Court granted certiorari and directed that the judgments below be vacated and the case remanded to the District Court with instructions to dismiss those causes of action involving solely construction work and to reconsider the remaining causes of action in the light of the decisions in the case of *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 68 S. Ct. 1031.

We think this analysis of the Murphy case is correct and that there is thus Supreme Court approval of the many cases of similar import from the Courts of Appeals. See *Reed* v. *Murphy*, 5 Cir., 168 F. 2d 257, affirmed as to construction workers in *Murphy* v. *M. T. Reed, et al, supra; Parham* v. *Austin*, 5 Cir., 158 F. 2d 566; *Noonan* v. *Fruco Construction Co.*, 8 Cir., 140 F. 2d 633; *Kelly* v. *Ford, Bacon & Davis*, 3 Cir., 162 F. 2d 555. These cases recognize that the rule they apply is in accord with the Interpretative Bulletin No. 5 of the Wage and Hour Division itself [3] expressing the view that employees engaged in the original construction of buildings ultimately used for production of goods for commerce are not within the scope of the Act. These cases all arose under the earlier definition. Certainly no broader coverage has

[3] Wage and Hour Interpretative Bulletin No. 5, Paragraph 12, Dec. 2, 1938, revised Nov. 1939, reads: "The question arises whether the employees of builders and contractors are entitled to the benefits of the Act. The employees of local construction contractors generally are not engaged in interstate commerce and do not produce any goods which are shipped or sold across state lines. Thus, it is our opinion that employees engaged in the original construction of buildings are not generally within the scope of the Act, even if the buildings when completed will be used to produce goods for commerce. * * *"

been intended by the amendment of 1949. Moreover, the construction workers here are at least one more step physically removed from production than are workers building facilities which are to be used for manufacturing or assembling for commerce. Here the end product of the construction work is the dam or, at most, the reservoir. These facilities then impound or contain water, which is then used in the manufacture of goods for commerce. As said in *10 East 40th St.* v. *Callus, supra:* "Remoteness of a particular occupation from the physical processes (of production) is a relevant factor in drawing the line."

Cases which apply the "engaged in commerce" provision of the Act are of course not applicable here. Thus we can derive little guidance in construing the definition section relating to production of goods for commerce from *Allstate Construction Co.* v. *Durkin,* 345 U.S. 13, and *Mitchell* v. *Vollmer,* 349 U.S. 427.

The Court of Appeals for the Tenth Circuit and the Court in the Eighth Circuit in the two Chambers Construction Company cases, *Mitchell* v. *Chambers Construction Co.,* 10 Cir., 214 F. 2d 515, and *Chambers Construction Co.* v. *Mitchell,* 8 Cir., 233 F. 2d 717 expressed the view that construction workers engaged in repairing and enlarging a city's water supply were not engaged in original construction and that the definition of production of goods was broad enough to cover them. The first case did not need to, and did not, decide the issue, because it affirmed the lower court's refusal to grant an injunction, even though the court said "we are inclined to agree" with the Secretary's contentions. In the second case the Court equated the new construction concept as to instrumentalities of commerce, *Vollmer* v. *Mitchell, supra,* with construction of facilities to be used for production of goods. With all deference to the court, it is clear that

it did not support its conclusion by an analysis of the cases clearly recognizing the distinction between these two bases for coverage.

Applying, as we must, the declared intent of Congress to require a showing of something more clearly related to production and something more directly essential to production than had obtained under the earlier law, we cannot consistently hold that this construction work was a covered occupation because one closely related and directly essential to the production of goods for commerce. This would not only amount to a reversal of our earlier decisions, but would also amount to narrowing the class of excepted occupations in the face of a Congressional mandate to broaden it.

We conclude that the record discloses that the occupations here involved were not covered under the Act.

The judgment is reversed for entry of judgment for appellant.

Judgment

Extract From the Minutes of January 5, 1959

No. 17311

H. B. ZACHRY COMPANY

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, (AND REVERSE TITLE)

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed for entry of judgment for appellant, H. B. Zachry Company, in accordance with the opinion of this Court.

U.S. GOVERNMENT PRINTING OFFICE: 1959